Washington Square church. The women spoke openly about their personal experiences and challenged the prevailing norms that "consigned abortion to silence and shame."[31]

Later that year, New York Assemblywoman Constance Cook, a Republican, introduced a bill to legalize abortion up to the twenty fourth week of pregnancy. In introducing the legislation, Cook observed that illegal abortions were the leading cause of maternal death, that one fifth of all women would have at least one abortion during their lives, and that most of the women who died in New York City from illegal abortions left children behind.32

The vote on Cook's bill was dramatic. Just as it appeared that the proposal would go down to defeat by a single vote, it was saved by Assemblyman George M. Michaels's lastminute change of heart. Michaels, who had served heroically in the Marine Corps during World War II, rose, called out to get the Speaker's attention, and then courageously reversed his initial vote against the bill, tearfully explaining: "I realize, Mr. Speaker, that I am terminating my political career, but I cannot in good conscience sit here and allow my vote to be the one that defeats this bill." And so, with Republican Governor Nelson Rockefeller's signature, the bill became law. *33

THE ANTIABORTION forces in New York quickly regrouped under the leadership of the Roman Catholic National Right to Life Committee (NRLC). Its goal, quite simply, was to overturn the new law and to reinstate the old one. Its approach had two distinct prongs one legal, the other political.34

On the legal front, Robert Byrn, a law professor at Fordham University and a leader of New York's Catholic antiabortion movement immediately filed a lawsuit challenging the constitutionality of the new law.' Byrn argued that from the moment of conception, the "unborn child" is a "person" within the meaning of the Constitution, and that the New York Jaw unconstitutionally deprived "unborn children" of "life ... without due process of law." The New York Court of Appeals, the state's highest court, rejected Byrn's argument, holding that a fetus is not a "person" within the meaning of the Constitution.35

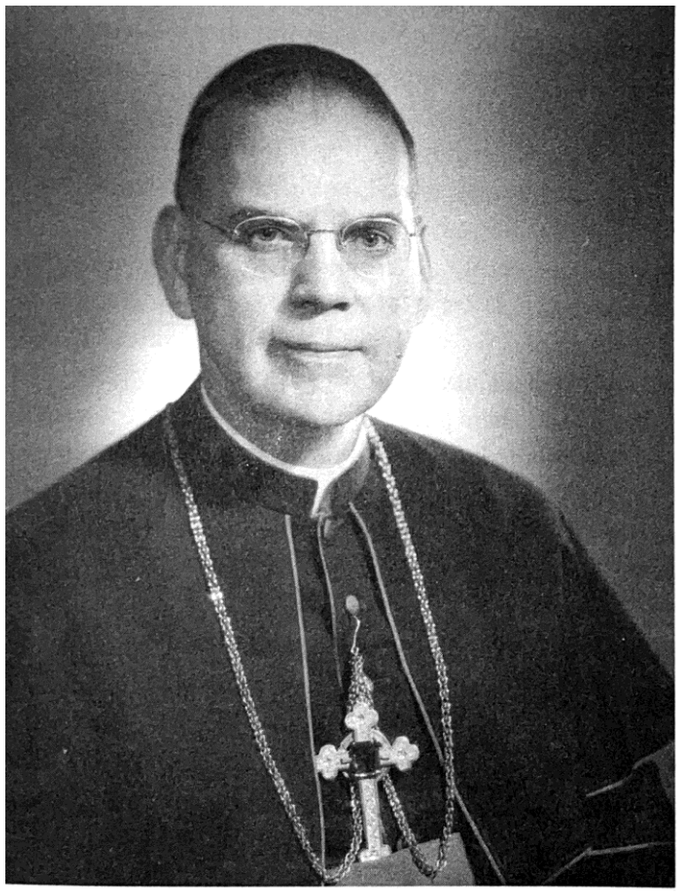
On the political front, opponents of the new law mobilized their forces.

* Michaels was right in his prediction. He ran for a sixth term in the next election in 1970 but did not get the Democratic nomination because of his vote on this bill. He never again won another election.

adding fuel to the fire, in early 1972 Congress approved the Equal Rights Amendment and submitted it to the states for ratification. This immediately the question of abortion to even larger issues about the "permissive" society the meaning of sex ro1es in American culture and the future of the traditional family. Phyllis Schlafly, a longtime conservative activist and an outspoken Catholic immediately tied abortion to the ERA and reframed woman's asserted right to abortion as women's abdication of motherhood.

As opponents of the ERA and abortion linked arms in a "profamily" union, Schlafly charged that the "women's libbers" were promoting "free sex" at the expense of motherhood and that they were encouraging "abortions instead of families" 6

On April 16, 1972, designated by Terence Cardinal Cooke, the Archbishop of New York, as "Right to Life Sunday," thousands of people partici



pated in an antiabortion rally in New York City. Meanwhile, the New York Right to Life Committee aggressively distributed antiabortion mail and more than fifty antiabortion organizations made phone calls, wrote letters, and threatened to defeat legislators who did not vote to repeal the new legislation. By rallying around a single issue in this manner and threatening to vote exclusively on this issue, the antiabortion forces put extraordinary pressure on public officials to acquiesce, or risk losing their seats.

The debate in the New York legislature was highly emotional. At one point, a member of the Assembly leaped to his feet crying, "We forgot the voiceless victim," while waving aloft a jar containing what purported to be a dead fetus. Such antics, which drew enormous press attention, combined with incessant and determined lobbying, got the job done. The repeal bill passed the New York Assembly by a margin of two votes.[37]

New York's Republican governor, Nelson Rockefeller, who had promised to veto any law that reinstated the ban on abortion, courageously kept his promise. Noting "the extremes of personal vilification and political coercion" that had been brought to bear on members of the legislature, Rockefeller suggested that there were "serious doubts that the vote to repeal the reform represented the will of a majority of the people of New York State." He concluded: "I do not believe it right for one group to impose its vision of morality on an entire society. The bill is disapproved."38

TURNING TO THE COURTS

AFTER A SERIES of legislative victories between 1967 and 1970, when thirteen states liberalized their abortion laws by enacting a version of the ALI proposal and four others legalized abortion in at least the first trimester, legislative progress suddenly ground to a halt. Despite increasing and clear majority public support for leaving the abortion decision to the woman and her doctor, no state legislature enacted reform legislation between 1970 and 1973.

Several factors contributed to this sudden legislative paralysis. The initial round of legislative victories both surprised and energized abortion opponents, especially the Catholic leadership, and after getting their act together they organized with extraordinary effectiveness. Moreover, those opposed to abortion threatened quite credibly to act as single issue voters, and they communicated that intention to elected officials with perfect clarity. As a result, many legislators came to understand that although a majority of citizens supported legalizing abortion, when election day rolled

around committed single issue voters could nonetheless vote them out of office.39

Faced with paralysis in the legislative arena, prochoice advocates began to think seriously about challenging the constitutionality of antiabortion statutes in the courts. Initially, this seemed a long shot because, in the words of the New York Times Supreme Court columnist Linda Greenhouse, the idea of a constitutional right of abortion seemed "illusory." But with legislative change effectively blocked, the courts increasingly seemed the best alternative.40

THE SUPREME court's 1965 decision in Griswold v. Connecticut was a useful starting point. Only two years after Griswold was decided, Roy Lucas, a student in his last year at NYU Law School, wrote a research paper for a class in which he argued that a woman's right to decide for herself whether or not to have a child should be understood as a fundamental constitutional right protected by the right of privacy recognized in Griswold.

Although Lucas's professors thought the argument implausible, others did not41 Harriet Pilpel, who had served as general counsel for both Planned Parenthood and the ACLU and had been involved in twenty seven cases before the Supreme Court, was so intrigued by the idea of a direct constitutional challenge to antiabortion laws that she and Lucas began to craft a test case to pose the question.42 In early 1970, before the New York legislature amended its abortion law, a group of lawyers, relying in part on Lucas's theory, filed four separate cases in federal court challenging the constitutionality of the New York law.

The state's lawyers argued that Griswold was irrelevant because, when dealing with abortion, the state is protecting the interests of "a potential human being's life." Before the federal court could address the question, the New York legislature amended the state's abortion statute, thus rendering the cases moot.43

AT THE same time in Connecticut, after the legislature repeatedly refused even to consider reforming its nineteenth century abortion statute, a group of women's liberation activists formed a new organization,

• See chapter 15.

"Women versus Connecticut," to challenge the constitutionality of the law. Their goal was to empower women by putting together a group of women plaintiffs, experts, and lawyers to mount their case. "We want control over our own bodies," they declared. "We are tired of being pressured to have children or not to have children. *It's our decision."* Because getting a new law through Connecticut's heavily Catholic legislature was clearly implausible, they turned to the courts.[44]

On March 2, 1971, in *Abele v. Markle,* "Women versus Connecticut"

filed its complaint in federal district court on behalf of 858 women plaintiffs. Six weeks later, a threejudge federal court, in a twotoone decision, held the Connecticut statute unconstitutional. Judge Edward Lumbard, an Eisenhower appointee, held that in this law, "Connecticut trespasses unjustifiably on the personal privacy and liberty of its female citizens in violation of the Ninth Amendment and the Due Process Clause." Judge Lumbard was especially concerned with the dignitary, psychological, social, medical, and economic consequences of forcing pregnancy and motherhood on unwilling women. These consequences, he explained, could fundamentally alter a woman's life to such an extent that the woman's interest in making this decision for herself outweighed the state's interest in protecting potential life.[45]

Cases challenging state antiabortion laws now started popping up everywhere. In Texas, Linda Coffee and Sarah Weddington, recent graduates of the University of Texas Law School, teamed up to bring a test case to challenge the constitutionality of the Texas antiabortion statute. The Texas law, which had been enacted in 1854, outlawed abortion except when necessary to save the life of the woman. They chose as their plaintiff a woman named Norma McCorvey, an unmarried, pregnant, twentyoneyearold. On March 3, 1970, Coffee and Weddington filed a complaint on behalf of McCorvey, now identified as 'Jane Roe" in order to protect her anonymity, alleging that the Texas law unconstitutionally infringed the fundamental right of women to decide for themselves whether or not to bear children.[46]

On June 17, 1970, a threejudge federal district court ruled unanimously that the "fundamental right" of a woman to decide for herself "whether to have children is protected by the Ninth Amendment" and that the Texas antiabortion statute therefore violated the United States Constitution. 47

On May 3, 1971, the Supreme Court announced that it would take up *Roe v. Wade.*

WHEN ROE v. WADE REACHED the Supreme Court, the Court itself was in a state of flux. President Richard Nixon was in the process of remaking the Court. Two years earlier, Nixon had replaced Chief Justice Earl Warren and Justice Abe Fortas, two liberal stalwarts, with two conservative nominees Chief Justice Warren Burger and Justice Harry Blackmun. Then, in September of 1971, just as the Court was about to take up the issue of abortion, Justices Hugo Black and John Marshall Harlan announced that for reasons of health, they too would step down.

Nixon appointed two more conservative justices, Lewis F. Powell and William Rehnquist, to succeed them. Because the confirmation process took several months and because neither Powell nor Rehnquist had been sworn in by the time the Court heard oral arguments in Roe, neither was eligible to participate in the consideration of the case.48

Roe was argued on December 13, 1971. In his opening argument in defense of the Texas law, Jay Floyd, representing the state, made one of the most inappropriate comments in the history of Supreme Court oral arguments. Appearing against two women lawyers, Floyd infamously began, "Mr. ChiefJustice and may it please the Court. It's an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word." The justices were not amused.

Three days later, the seven participating justices met in conference to discuss the case and to cast their preliminary votes. After some deliberation, there seemed to be at least five votes to hold the Texas statute unconstitutional. There was uncertainty, however, about the precise rationales for the individual justices' positions. Justices Blackmun and Stewart indicated that they were inclined to join Justices Douglas, Brennan, and Marshall in striking down the statute, but they had reservations.

As the father of three daughters, Blackrnun was attuned to the significance of the abortion issue. Moreover, in light of his experience for almost a decade as general counsel to the Mayo Clinic, he was sympathetic to the interests of doctors who wanted the freedom to act in what they believed to be the best interests of their patients. On the other hand, Blackmun had been nominated by Richard Nixon in no small part because of his longstanding record of judicial restraint. He was acutely aware that a decision striking down the Texas statute would be seen in many quarters as a classic example of judicial activism. This was not why he had been appointed. He was unsure how to proceed.

Justice Potter Stewart believed strongly that the Court should avoid issues with significant political implications. He had dissented in Griswold and he remained skeptical of the notion that there exists a wideranging constitutional right of privacy. Nonetheless, Stewart found the prohibition of abortion deeply troubling.

Justice White, who also had dissented in *Griswold,* voted in conference to uphold the Texas statute. Chief Justice Burger's position at the conference was unclear. To the dismay of some of his brethren, he assigned the task of writing the Court's opinion to Justice Blackmun; in part because he was confident that he could count on his longtime friend and colleague to write a "narrowly focused" opinion that "would discharge the Court's duty without doing or saying anything more than necessary."[49]

Blackmun was both pleased and daunted by the assignment. He knew that whatever he did in *Roe,* he would make enemies. This early in his tenure on the Court, this prospect made him uneasy. At the same time, though, Blackmun was convinced that he was the only justice with the medical background necessary to deal with the scientific issues at stake.

Blackmun's initial draft sought to dispose of the case on vagueness grounds. What, he asked in his draft opinion, did it mean to say that a doctor can legally perform an abortion only to save the life of the woman? Did this mean that the doctor could perform an abortion "only when, without it, the patient will surely die? Or only when the odds are greater than even that she will die? Or when there is a mere possibility that she will not survive? ... Must death be imminent?"

In effect, Blackmun argued that the statute was "insufficiently informative" to meet the demands of due process for the physician who would have to cope with these uncertainties at the risk of his medical career and his personal freedom. If the physician guessed wrong about the meaning of the law, he could land in jail. Although acknowledging that the case raised deeper issues, Blackmun's draft reasoned that the Court did not need to reach those larger issues because the particular law at issue in the case was unconstitutionally vague. Blackmun's draft fell well short of what the Court's more liberal justices

• Burger's decision to assign the task of writing the majority opinion rankled some of the other justices because, according to Supreme Court tradition, the chief justice has that authority only if he has voted with the majority. Because Burger had not clearly voted one way or the other at conference, Justice Douglas, as the senior justice in the majority, ordinarily would have had the prerogative of assigning the majority opinion. Douglas was furious with Burger for, in his view, usurping his authority.

Douglas, Brennan, and Marshall had expected. There had been considerable discussion at conference and in exchanges among the justices about a broader approach, one that invoked the principles of *Griswold* and *Eisenstadt* and that recognized what they saw as a woman's constitutionally protected interest in making for herself the fundamental decision whether or not to bear an unwanted child. Blackmun's draft contained none of that. Though Blackmun was sympathetic to this approach, he was not yet ready to embrace such a right.[50]

As the Court's term drew to a close, and just after President Nixon started making his series of sharply antiabortion speeches in the spring of 1972, Blackmun suggested that he needed more time to craft his opinion. The other justices acquiesced in this request and agreed to set the case for rearrangement the following fall. Not only would that give Blackmun more time, but it would also enable Justices Powell and Rehnquist to participate.

DURING THE summer of 1972, Harry Blackmun spent much of his time at the Mayo Clinic library reviewing books and articles on the history and practice of abortion. Blackmun's handwritten notes suggest that he was struck particularly by an observation in the *American Journal of Public Health* that the "risk of legal abortion in the first trimester is less" than the risk of "carrying pregnancy to term"; by a June 1972 Gallup poll that showed that 64 percent of Americans thought that "abortion should be a matter for decision solely between a woman and her physician"; and by his realization that the criminalization of abortion was a "relatively recent phenomenon, without roots in the English commonlaw tradition."

After Roe was reargued on October 11, 1972, the justices met again in conference, this time with Justices Powell and Rehnquist in attendance. To the surprise of the other justices, Lewis Powell, a courtly, softspoken, cautious conservative from Virginia, announced that he supported recognizing a constitutional right to abortion and he encouraged Blackmun to move beyond the vagueness rationale. Powell apparently first became sympathetic to the right of legal abortion after the girlfriend of one of the employees of his Richmond law firm bled to death while the couple attempted to perform an illegal hanger abortion. Powell was instrumental in persuading prosecutors not to file criminal charges against the boyfriend.

Although Justices White and Rehnquist made clear that they could not support a decision invalidating the Texas law, by the end of the conference it was clear that there were at least six, and probably seven (Burger was still not ready to commit) votes to invalidate the Texas statute and, more

broadly, the antiabortion statutes currently on the books in forty five other states, on the ground that they failed to respect the fundamental constitutional right of a woman and her physician to decide for themselves whether to terminate an unwanted pregnancy.52

THE SUPREME COURT announced its decision in Roe v. Wade on January 22, 1973. * The Court held the Texas abortion statute unconstitutional by a vote of seven to two. In his opinion for the Court, Justice Blackmun began by acknowledging "the sensitive and emotional nature of the abortion controversy" and the "deep and seemingly absolute convictions that the subject inspires." The Court's task, he explained, "is to resolve the issue by constitutional measurement, free of emotion." Blackmun added that to put the issue in its proper context, it was necessary to understand the historical evolution of attitudes toward abortion over the centuries.53

Turning to that history, Blackmun observed that the criminalization of abortion was a relatively recent phenomenon. Laws prohibiting the procedure, he explained, were not of ancient origin, but derived from legislation in the late nineteenth century. In the ancient world, he observed, particularly in Greece and Rome, neither law nor religion forbade abortion. Moreover, under the AngloAmerican common law, abortion before quickening was not a crime. Indeed, a review of the common law precedents led him to conclude that even post quickening abortion was rarely enforced as a common law crime.54

Blackmun noted further that it was only in the latter part of the nineteenth century that most states banned abortion unless necessary to preserve the life of the woman. It was thus apparent, he concluded, that "at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, ...a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today."55

After reviewing the history of medical views on abortion,56 Blackmun identified the three arguments that had most often been advanced in the late nineteenth century to justify strict criminal laws against abortion. First,

Although the opinions were ready to be announced by mid January, Chief Justice Burger dawdled while he drafted a brief concurring opinion. Justice Blackmun suspected, with good reason, that Burger was intentionally delaying the announcement of the decision until after President Nixon's second inauguration on January 20, because he wanted to save Nixon the embarrassment of seeing three of his appointees to the Court recognizing a constitutional right to abortion

some antiabortion advocates had insisted that such laws could be justified in terms "of a Victorian social concern to discourage illicit sexual conduct." Blackmun dismissed this justification as plainly inadequate, noting that no legal authority today takes this argument "seriously" as a legitimate justification for banning abortion.[57]

Second, some defenders of restrictive abortion laws had argued that such law were necessary to protect pregnant women against the temptation to submit to dangerous procedures that might place their lives "in serious jeopardy." Although noting, that abortion had indeed been risky prior to the "development of antisepsis, Blackmun emphasized that modern medical techniques had clearly altered this situation and that by 1973 it was well established that abortion prior to the end of the first trimester was generally a very safe procedure. At the same time, though, Blackmun noted that states have a legitimate interest in ensuring that abortion, like any other medical procedure, is performed under appropriate circumstances. He therefore concluded that states retain an interest in protecting the woman's own health and safety when an abortion is proposed "at a late stage of pregnancy," when the medical risks to the woman are potentially greater.58

Third, Blackmun noted that some defenders of antiabortion laws had argued that such laws were necessary to protect the lives of unborn children. Without attempting to resolve the question of when human life begins, Blackmun acknowledged that the government has a legitimate interest at stake when "at least *potential* life is involved."[59]

HAVING THUS laid out the state interests in regulating abortion,

Blackmun turned next to identifying the constitutional interests on the other side. Although noting that the Constitution does not explicitly enumerate a right to privacy, Blackmun pointed out that in a line of decisions going back to the 1890s, the Court had repeatedly recognized that "a right of personal privacy" exists under the Constitution.[60] As examples, Blackmun cited a long list of decisions, including *Skinner v. Oklahoma,*[61] in which the Court had recognized a fundamental right not to be sterilized; *Stanley v. Georgia,*62 in which the Court had recognized a fundamental right to possess obscenity in the privacy of the home; *Griswold v. Connecticut,*[63] in which the Court had recognized a fundamental right of married couples to use contraceptives; *Loving v. Virginia,*64 in which the Court had recognized a fundamental right to marry; and *Eisenstadt v. Baird,*[65] in which the Court had recognized a fundamental right of individuals to decide for themselves whether to bear or beget a child."66